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IN THE

Supreme Court of the United States

THE CITY AND COUNTY OF SAN FRANCISCO, ITS MAYOR, BOARD OF SUPERVISORS, AND CITY ATTORNEY; THE CITY OF SANTA MONICA, ITS MAYOR, CITY COUNCIL, AND CITY ATTORNEY,

Petitioners,

v.

BANK OF AMERICA, N.A.; WELLS FARGO BANK N.A.; THE CALIFORNIA BANKERS ASSOCIATION; AND CALIFORNIA FEDERAL BANK

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

RODNEY R. PECK
MICHAEL J. KASS
PILLSBURY WINTHROP LLP
50 FREMONT STREET
SAN FRANCISCO, CA 94105
415-983-1000

ATTORNEYS FOR CALIFORNIA BANKERS ASSOCIATION

E. EDWARD BRUCE
(*Counsel of Record*)
STUART C. STOCK
KEITH A. NOREIKA
COVINGTON & BURLING
1201 PENNSYLVANIA AVE., NW
WASHINGTON, DC 20004
202-662-6000

ATTORNEYS FOR BANK OF AMERICA, N.A. AND WELLS FARGO BANK, N.A.

QUESTION PRESENTED

Whether the Court of Appeals correctly held that ordinances which bar ATM usage fees are preempted under the National Bank Act, when (1) it is undisputed that national banks have authority under the Act to provide ATM services and to charge non-interest fees for their authorized services, (2) the Office of the Comptroller of Currency specifically confirmed the authority of national banks to charge the fees barred by the ordinances, and (3) all of the other federal courts that have decided the issue have held that state and local government laws prohibiting national banks' non-interest fees are preempted?

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE

Respondent Bank of America, N.A., is a wholly owned subsidiary of NB Holdings Corporation, which is, in turn, a wholly owned subsidiary of Bank of America Corporation, a publicly traded corporation. No single shareholder owns 10% or more of Bank of America Corporation's publicly traded shares.

Respondent Wells Fargo Bank, N.A., is a wholly owned subsidiary of WFC Holdings Corporation, which is, in turn, a wholly owned subsidiary of Wells Fargo & Company. Wells Fargo & Company is a publicly traded corporation, in which no single shareholder owns 10% or more of its publicly traded shares.

Respondent California Bankers Association ("CBA") is a nonprofit trade organization of approximately 260 members, all of which are banks doing business in California. CBA does not issue securities, nor does it have any publicly owned parent, subsidiary, or affiliate companies.

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RESPONDENT BANKS' OPPOSITION TO THE PETITION FOR CERTIORARI

Petitioners (the "Cities") argue that the Court of Appeals' decision regarding the authority of "national banks to charge non-interest fees is in direct conflict with opinions of the Eleventh Circuit and the California Supreme Court." Pet. 3. As respondents (the "Banks") will show, the Cities' conflict is based on their misreading of the two appellate decisions upon which they rely and their disregard of recent decisions of district courts in the Sixth, Eighth and Eleventh Circuits that reached the same conclusion as the Ninth Circuit in this case and the Fifth Circuit in another case. Moreover, this Court's own recent decisions show there is no conflict regarding a purported presumption against preemption in National Bank Act cases. Finally, the Banks will show that the Cities offer no other plausible arguments that warrant this Court's review.

STATEMENT OF THE CASE

A. The Ordinances

The Cities' nearly identical Ordinances prohibit any "financial institution" from imposing a "surcharge of any kind" for the use of an automated-teller machine ("ATM") card that is not issued by the institution that operates the ATM. SF Ord. §§ 2(a)(v) & 2(b) (Pet. App. 60-61); SM Ord. § 2(b) (Pet. App. 65-66). Thus, the Ordinances prohibit the Banks from charging non-depositors fees for using an ATM.

As their preambles make clear, the Ordinances are designed to force Bank of America and Wells Fargo – the two largest banks in California – to provide ATM services to the general public without directly charging for that service

in order to restructure competition in the banking industry.[1] Reflecting this purpose, the Ordinances do not apply to the hundreds of ATMs in San Francisco and Santa Monica that are operated by American Express, E*Trade, and other companies that are not "financial institutions" within the meaning of the Ordinances. Pet. App. 60, 65.

Enforcement of the Ordinances lies principally in the hands of the individuals who pay the proscribed fee. Even though advised by notices on the ATM terminal or its display screen that an ATM fee will be imposed and given the option to cancel the transaction before paying the fee, ER106; BSER36, 44,[2] the Ordinances give any person who pays even a single $1.50 ATM fee the right to sue for "actual damages" of not less than $250 plus attorney's fees and costs. SF Ord. § 2(c)(i) (Pet. App. 61); SM Ord. § 2(c)(1) (Pet. App. 66). Moreover, such persons are entitled to additional punitive damages of up to $5,000 per violation, if a financial institution has engaged in a "pattern" of "willful violations." SF Ord. § 2(c)(i) (Pet. App. 61); SM Ord. § 2(c)(1) (Pet. App. 66).[3]

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[1] The San Francisco Ordinance, for instance, states that "in California, just two banks [Bank of America and Wells Fargo] . . . are able to impose higher costs on account holders of smaller institutions who in many cases have little choice but to use the ATMs of the large institutions." The Ordinance asserts that the "[i]mposition of ATM surcharges raises serious anti-competitive concerns" by disadvantaging small banks with fewer ATMs. Pet. App. 58. *See also* SM Ord. § 1 (Pet. App. 64).

[2] "ER" refers to Petitioners' Excerpts of Record in the Court of Appeals. "BSER" refers to the Banks' Supplemental Excerpts of Record below.

[3] The Ordinances also allow the City Attorney, the District Attorney, or any person who will fairly and adequately represent the interests of the protected class to seek an injunction barring ATM charges (...continued)

B. The Economics Of ATMs

The Cities focus on the alleged costs and revenues of ATM operations, including the interchange fee established by networks that ATM owners receive from other banks. Pet. 9-10. While irrelevant to the question presented, the Cities' mischaracterization of the economics of the ATM market should not go uncorrected.

As the most recent Federal Reserve study referred to in the record shows, ATMs are net "cost [*not profit*] centers" for banks. Federal Reserve Banks, 1997 Commercial Banks Product Comparisons, National Average Report, at 204-05 (cited at BSER71 n.8). Thus, banks on average *lose* between $8,000 and $11,000 per terminal per year. *Id.* Per transaction, banks lose on average between twenty and fifty cents. *Id.*

The Cities ignore the competitive context in which national banks establish and operate such ATMs. Banks compete with the non-financial institutions that are not subject to the Ordinances. BSER76 (citing McAndrews, "ATM surcharges," *Current Issues in Economics and Finance*, Federal Reserve Bank of N.Y., Vol. 4, No. 4, Apr. 1998). Many lessors require ATM operators to split revenues generated from ATM user fees machines at the site as part of the lease payment. BSER77 (citing Dove Assocs., Inc., *1999 ATM Deployer Study* (Nov. 1998)). If the Banks are prohibited from charging ATM user fees, American Express and other ATM owners that are permitted to charge such fees will be able to compensate lessors with a share of the revenues from those locations, while the Banks would be unable to do so. The Ordinances would thereby deprive the

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by any financial institution. SF Ord. § 2(c)(ii) (Pet. App. 61-62); SM Ord. § 2(c)(2) (Pet. App. 66-67).

Banks of a fair opportunity to compete for ATM sites at high-volume locations, like airports and shopping malls.

C. The National Bank Act

This Court's most recent (and unanimous) decision involving preemption under the National Bank Act, *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 32 (1996), recognized that there is a "history . . . of interpreting grants of both enumerated and incidental 'powers' to national banks as grants of authority not normally limited by, but rather ordinarily pre-empt[], contrary state law," citing *First Nat'l Bank of San Jose v. California*, 262 U.S. 366, 368-69 (1923); *Easton v. Iowa*, 188 U.S. 220, 229-30 (1903); *Waite v. Dowley*, 94 U.S. 527, 533 (1876).

Under the Act, Congress has authorized national banks, like Bank of America and Wells Fargo, to exercise "all such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. § 24(Seventh). Regulations issued by the Office of the Comptroller of the Currency ("OCC"), the agency that regulates national banks, interpret § 24(Seventh) as authorizing national banks to provide services via ATMs, 12 C.F.R. §§ 7.1019 & 7.4003, and to collect non-interest charges and fees for any banking services that they are authorized to provide, 12 C.F.R. § 7.4002.[4]

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[4] 12 C.F.R. § 7.4002 provides in pertinent part:

> (a) *Authority to impose charges and fees.* A national bank may charge its customers non-interest charges and fees. . . .
>
> (b) *Considerations.* (1) All charges and fees should be arrived at by each bank on a competitive basis . . . .
>
> (2) The establishment of non-interest charges and fees, their amounts, and the method of calculating them are business decisions to be made by each bank, in its discretion, according to

(...continued)

The OCC's First Senior Deputy Comptroller and Chief Counsel confirmed that "Bank [of America] may . . . charge the [ATM] fees it has established 'in its discretion' pursuant to the authority vested in the Bank by § 7.4002(a) [of the regulations] and § 24(Seventh) of the National Bank Act." ER76. This Court has made clear that the OCC's interpretation of the National Bank Act as embodied in OCC regulations and interpretative letters is entitled to deference. *See United States v. Mead Corp.*, 533 U.S. 218, 231 n.13 (2001); *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 257 (1995).[5]

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sound banking judgment and safe and sound banking principles. A national bank establishes non-interest charges and fees in accordance with safe and sound banking principles if . . . it considers the following factors, among others:

(i) The cost incurred by the bank in providing the service;

(ii) The deterrence of misuse by customers of banking services;

(iii) The enhancement of the competitive position of the bank . . .; and

(iv) The maintenance of the safety and soundness of the institution.

(c) *Interest.* Charges and fees that are "interest" . . . are governed by § 7.4001 and not by this section.

(d) *State law.* The OCC applies preemption principles derived from the United States Constitution, as interpreted through judicial precedent, when determining whether State laws apply that purport to limit or prohibit charges and fees described in this section.

[5] The Cities merely mention the Electronic Funds Transfer Act ("EFTA"), 15 U.S.C. § 1693 *et seq.*, in the Statement of the Case, Pet. 7-8, thereby abandoning their argument below that the EFTA's saving clause, 15 U.S.C. § 1693q, avoids National Bank Act preemption. *See*

(...continued)

REASONS FOR OPPOSING THE WRIT

I. ALL FEDERAL COURTS THAT HAVE CONSIDERED STATE AND LOCAL LAWS PROHIBITING NATIONAL BANK NON-INTEREST FEES FOR SERVICES HAVE FOUND PREEMPTION

The Cities' argument that its petition is justified by the need to "resolve the conflict among the Eleventh, Ninth and Fifth Circuits and the California Supreme Court," Pet. 15, is completely unfounded.

In the past three and one-half years, seven different federal courts have confronted the question whether the National Bank Act, as interpreted in regulations issued by the OCC pursuant to that Act, preempts State or local laws that bar national banks from charging non-interest fees. In every instance, those courts have found preemption:

(1) the opinion of the district court in this case invalidating the Cities' Ordinances, Pet. App. 27-36;

(2) the unanimous opinion of the Court of Appeals in this case, Pet. App. 1-26;[6]

Pet. App. 21-23, rejecting that argument. *See also Bank One v. Guttau*, 190 F.3d 844, 850 (8th Cir. 1999), *cert. denied*, *Foster v. Bank One*, 529 U.S. 1087 (2000) (same). Moreover, the Cities' reference to a 1999 EFTA amendment, which mandates "Fee Disclosures at [ATMs]," Pet. 8, supports the Banks, because it would be inoperative if the EFTA allowed State and local governments to bar ATM fees. Similarly, the Cities' reference to unsuccessful "[p]revious federal [legislative] attempts to bar ATM surcharges outright," *id.*, helps the Banks, not the Cities.

[6] A different unanimous panel of the Ninth Circuit affirmed the district court's preliminary injunction, thereby rejecting basically the same arguments later advanced by the Cities in the appeal that prompted their petition to this Court. *Bank of America, N.A. v. City and County of San Francisco*, No. 99-17590, 2000 WL 340773 (9th Cir. Mar. 31, 2000).

(3) *Wells Fargo Bank of Texas, N.A. v. James*, 184 F. Supp.2d 588 (W.D. Tex. 2001) (holding Texas's check-cashing fee ban preempted);

(4) *Wells Fargo Bank of Texas, N.A. v. James*, 321 F.3d 488 (5th Cir. 2003) (the unanimous opinion of the Fifth Circuit affirming the district court's decision);

(5) *Metrobank v. Foster*, 193 F. Supp. 2d 1156 (S.D. Iowa 2002) (holding Iowa's ATM usage fee ban preempted);

(6) *Bank of America, N.A. v. Lawson*, 2002 WL 31965741 (M.D. Tenn. Oct. 15, 2002) (holding Tennessee's check-cashing fee ban preempted);

(7) *Bank of America, N.A. v. Sorrell*, 2002 WL 32058517 (N.D. Ga. Dec. 18, 2002) (holding Georgia's check-cashing fee ban preempted).

In the Iowa, Tennessee and Georgia cases all three State Attorneys General determined not to appeal, even though the Iowa and Tennessee cases were decided before the Ninth Circuit's decision in this case and the Fifth Circuit's decision in *Wells Fargo v. James*. The acceptance by these State Attorneys General of the district court decisions regarding the preemption of national bank non-interest fees shows that the legal principles in this area are now clearly established. Indeed, they are so clear that the Tennessee Attorney General declined to defend that State's check-cashing fee ban and the statute was preempted by a consent judgment. *Id.*

The Cities' so-called "conflict" between the "Circuits" is based upon *Video Trax, Inc. v. NationsBank, N.A.*, 33 F. Supp. 2d 1041 (S.D. Fla. 1998), which the Eleventh Circuit affirmed *per curiam*, 205 F.3d 1358 (11th Cir.), *cert. denied*, 531 U.S. 822 (2000). *Video Trax* rejected the argument that bank overdraft fees were "interest" and thus could be regulated as "usurious" under 12 U.S.C. § 85, which generally limits the interest rates that can be charged

by national banks to the "rate allowed by the laws of the State, Territory, or District where the bank is located." *Id.* It went on to uphold the overdraft fees because they "substantially satisfy" the reasonableness factors set forth in 12 C.F.R. § 7.4002, the OCC's non-interest fee regulation, *see* p. 4 n.4, *supra*, and were "a fair and efficient method of allocating the administrative costs . . . ." 33 F. Supp. 2d at 1051. To the extent *Video Trax* is at all relevant here, it supports the Banks because it recognizes the central role of the OCC's fee regulation.

The Cities' reliance upon *Perdue v. Crocker National Bank*, 38 Cal. 3d 913 (1985), in the face of the uniform federal court bank-fee decisions, does not create a conflict or introduce any uncertainty as to the applicable law in this area. In *Perdue*, that was decided 15 years before the federal cases upon which the Banks rely, the California court held that "no provision of federal law discusses bank service charges." *Id.* at 942. In so holding, the California court refused to give any weight to a prior OCC regulation that authorized such charges. Subsequently, this Court in *NationsBank*, 513 U.S. at 257, held that courts should defer to the OCC's interpretation of the National Bank Act regarding the nature and extent of national bank authority. Moreover, *Perdue* held State law that allowed courts to determine whether prices were unreasonably high was "part of the common law governing all commercial transactions . . . [and] regulate[d] not only [the] sale of bank services but the sale of groceries, automobiles, furniture, or medical [devices]." 38 Cal. 3d at 943. That decision in no way supports local or State laws that prohibit national banks from charging any fee for their authorized services.

II. THERE IS NO "PRESUMPTION AGAINST PREEMPTION" IN NATIONAL BANK ACT CASES

The three Circuit decisions relied upon by the Cities to create a "conflict" regarding a "presumption against preemption," Pet. 20-21, do not help them: *Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818, 828 (1st Cir. 1992), did not involve a national bank and found no preemption; *National State Bank v. Long*, 630 F.2d 981, 985 (3d Cir. 1980), involved a New Jersey statute prohibiting discrimination in lending and did not conflict with a national bank's exercise of its authorized powers under the National Bank Act; and *Video Trax*, upheld the bank fee at issue there. The Court of Appeals' rejection of the Cities' argument that there is a "presumption against preemption" which should have been applied by that court does not conflict with these other decisions.

More importantly, the Court of Appeals' decision is perfectly consistent with this Court's two most recent, relevant decisions. First, the holding in *Barnett Bank*, 517 U.S. at 32, in the course of striking down a Florida statute as preempted, that "grants of both enumerated and incidental 'powers' to national banks" by the National Bank Act are "*not normally limited by, but rather ordinarily preempt[ ] contrary state law*" is the antithesis of a presumption against preemption (emphasis added). Second, in *United States v. Locke*, 529 U.S. 89, 108 (2000), the Court rejected the argument that there was an "'assumption' of non-preemption . . . when the State regulates in an area where there has been a history of significant federal presence." The history of preemption of State law purporting to regulate the authorized activities of federally chartered banks reaches back to the beginnings of the Republic. *See M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 426 (1819).

In any event, presumptions play no role in this case. The Cities cannot dispute that national banks have the power under the National Bank Act to provide ATM services nor that the OCC's regulations permit national banks to charge fees for the authorized services. *See* pp. 4-5, *supra*. The Ordinances prevent the Banks from charging a fee which they establish for the use of that service. Even an anti-preemption presumption could not save the Ordinances.

III. THE ISSUE PRESENTED HERE DOES NOT MERIT THIS COURT'S PLENARY ATTENTION

The Cities' last-ditch argument that the importance of the issue in this case should lead to a grant of their petition is wholly without merit. Much of that argument, Pet. 25, is based upon questionable sources, similar to the Cities' reliance on "[o]ne writer [who] recently referred to federal preemption of state banking rules as a 'bubbling, rising, hot issue.'" Pet. 2. In fact, this is merely an item from the "Credit Union Journal" quoting a person identified as the "chief lobbyist for" the National Association of State Credit Union Supervisors. Pet. App. 73-74.

The Cities' reliance upon "Congress['s] . . . concern[ ] with the OCC's position that the National Bank Act preempted all state regulation of national bank fees," Pet. 27, is based on committee reports criticizing an OCC regulation that was withdrawn in 1994. Moreover, H.R. Conf. Rep. No. 651, 103rd Cong., 2d Sess. (1994), from which the Cities extensively quote, Pet. 27-28, made it clear that the only amendment to the National Bank Act enacted by Congress as a result of this "concern" was "intended to provide readily available and widespread notice to interested parties of the opportunity to comment on preemption," and that "[t]his process is not intended to . . . change the

substantive theories of preemption as set forth in existing law." H.R. Conf. Rep. No. 651, at 55.[7]

Specifically, the 1994 amendment simply requires the OCC to follow notice and comment procedures "[b]efore issuing any opinion letter or interpretative rule ... that concludes that Federal law preempts the application to a national bank of [certain] State law[s] ...." 12 U.S.C. § 43(a). No such "opinion letter or interpretative rule" on preemption was sought by the Banks nor issued by the OCC in this case. The letter provided by the OCC to the Banks, p. 5, *supra*, addressed only their authority under the National Bank Act to charge fees for ATM services. The OCC subsequently filed an amicus brief in the Court of Appeals which advised the court of the agency's view that the Ordinances are preempted. *See* 12 U.S.C. § 43(c)(2), which provides that the notice and comment required for OCC preemption opinions and interpretative rules "shall not apply with respect to materials prepared for use in judicial proceedings ...."

Another strand of the Cities' "importance" argument is a lengthy string cite to various federal district court and State appellate decisions which they assert deal with State regulation of bank fees. Of the six federal court decisions, the two that decided national bank fee preemption issues went against the States.[8] Two others were dismissed for absention or lack of standing.[9] The fifth held that the

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[7] The Petition confusingly cites pp. 116-18 and 117 of the Conference Report, whereas the last page of that report is 67.

[8] *Metrobank*, 193 F. Supp. 2d 1156; *First Union National Bank v. Burke*, 48 F. Supp. 2d 132 (D. Conn. 1999).

[9] *Goleta National Bank v. O'Donnell*, No. C2-01-971, 2002 WL 31946062 (S.D. Ohio Dec. 18, 2002); *Goleta National Bank v. Lingerfelt*, 211 F. Supp. 2d 711 (E.D. N.C. 2002).

National Bank Act preempted State laws governing credit card interest,[10] and the sixth simply upheld application of the State's business judgment rule.[11] Only one of the nine State cases cited by the Cities involved a national bank, holding that its contracts with depositors were subject to State law.[12] The eight others involved financial institutions governed by the Homeowners Lending Act ("HOLA"), 12 U.S.C. § 1461 *et seq.*, and other statutes.[13]

Finally, the Cities point to several States that joined a California amicus brief supporting their appeal of the district court's ruling. Pet. 26-27; Pet. App. 68. Much more important are the views of the OCC in the amicus briefs that it filed in this case, Pet. App. 19 & n.7, and in the *Wells Fargo* case, 321 F.3d at 490 & n.2, supporting the Banks' reliance on 12 U.S.C. § 24(Seventh) and the OCC's non-interest fee regulation, 12 C.F.R. § 7.4002.

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[10] *Ament v. PNC National Bank*, 849 F. Supp. 1015 (W.D. Pa. 1994).

[11] *Joy v. North*, 519 F. Supp. 1312 (D. Conn. 1981).

[12] *Wallace v. National Commerce Bankcorporation*, 1993 WL 44600 (Tenn. Ct. App. Feb. 23, 1993).

[13] The Banks will not address the Cities' attack upon the Ninth Circuit's decision that HOLA preempts the Ordinances. The California Bankers Association argued successfully in the district court that, if the Ordinances were preempted by virtue of their application to national banks, they could not be severed so as to apply only to State banks or other financial institutions. Accordingly, the district court ordered injunctive relief that prevented the San Francisco Ordinance from becoming effective and directed Santa Monica to suspend its Ordinance. Pet. App. 35-36. The Cities' appeal to the Ninth Circuit did not challenge the district court's non-severability ruling. Therefore, this Court's rejection of the Cities' arguments concerning preemption under the National Bank Act would moot the HOLA question that they raise in the petition.

CONCLUSION

For the reasons stated above, the petition should be denied.

RODNEY R. PECK
MICHAEL J. KASS
PILLSBURY WINTHROP LLP
50 FREMONT STREET
SAN FRANCISCO, CA 94105
415-983-1000

ATTORNEYS FOR CALIFORNIA BANKERS ASSOCIATION

E. EDWARD BRUCE
(*Counsel of Record*)
STUART C. STOCK
KEITH A. NOREIKA
COVINGTON & BURLING
1201 PENNSYLVANIA AVE., NW
WASHINGTON, DC 20004
202-662-6000

ATTORNEYS FOR BANK OF AMERICA, N.A. AND WELLS FARGO BANK, N.A.

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